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No. 94-458

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LOCAL 783, BRIDGE AND STRUCTURAL AND ORNAMENTAL IRONWORKERS,

Petitioner,

v.

BE&K CONSTRUCTION CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals' holding that a union ratified and condoned its members' unlawful, violent conduct by paying for their bail, legal fees, and fines and by other acts, without disavowing such unlawful acts, conflicts with applicable decisions of the Court.

LIST OF PARTIES

The parties to the proceeding are petitioner, Local 783, Bridge, Structural and Ornamental Iron Workers, respondent BE&K Construction Co.[1], and the National Labor Relations Board.

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[1] BE&K Construction Co.'s parent company is BE&K, Inc. BE&K Construction Co. is affiliated with the following companies:

154211 Canada, Inc.
Allstates Design & Development Co., Inc.
BE&K of Delaware, Inc.
BE&K Engineering Company
BE&K Environmental, Inc.
BE&K Properties, Inc.
BE&K of Texas, Inc.
Danes Construction Company, Inc.
Quality Maintenance, Inc.
Tool Specialty, Inc.
ViaTech Services, Inc.

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No. 94-458

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LOCAL 783, BRIDGE AND STRUCTURAL AND ORNAMENTAL IRONWORKERS,

Petitioner,

v.

BE&K CONSTRUCTION CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent BE&K Construction Co. ("BE&K") opposes Local 783, Bridge, Structural and Ornamental Ironworkers' ("Union") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

STATEMENT OF THE CASE

1. Introduction

This case involves one of the worst episodes of labor violence by organized labor against non-union employees in recent decades. On September 9, 1989, a mob of about 450 unionists and others stormed BE&K's temporary housing facility in International Falls, Minnesota, and destroyed it, causing over $2,000,000 in property damage and serious personal injuries to a number of persons trying to protect the property. Following the riot, police detained twenty-seven current or former members of the Union and members of other Ironworker Locals working out of the Union's hiring hall leaving International Falls on a chartered bus. 23 F.3d at 1463. The bus had traveled through the night, from a town over 400 miles away, located near the Union's offices where most of its members were working at the time. *Id.* Fourteen of those detainees were arrested and a lesser number conficted of various criminal acts committed during the riot. *Id.* at 1463-64.

For many months preceding the riot, the unionized construction trades, including the Ironworkers, expressed "animosity" and "virulent" hostility towards Boise Cascade for naming BE&K the contractor to perform a large expansion of its paper mill in International Falls. *Id.* at 1462. There were well-publicized incidents of union violence against BE&K employees preceding the riot. *Id.* at 1462, 1464. John LaVallee, the Union's long time business manager, was interested in the BE&K project and urged his membership to assist the Minnesota unions in resisting the use of non-union labor on the Boise Cascade project. *Id.* at 1464, 1468-9.

The bus used to make the trip was hired surreptitiously under the name "concerned persons." *Id.* at 1464. LaVallee had telephone contact with the owner of the bus less than eight hours before the bus departed for International Falls. 311 NLRB at 741-42.

Following the riot, after consultation with the Union's President, LaVallee traveled to Minnesota, set up a "base of operations," and undertook "major relief efforts" to aid his arrested members and affiliates. 23 F.3d at 1465. These efforts, which took almost a week and several trips to International Falls, included obtaining a loan of $30,000 from the Union's bank, given as an accommodation to the Union. *Id.* These funds were used to provide arrested members and affiliates with money to pay bail, attorneys fees, and fines levied upon their convictions for criminal conduct. *Id.* The loan was repaid with contributions collected by the Union from members in less than a two-month period. *Id.*

The Union never disavowed or otherwise expressed disapproval of the unlawful acts of violence committed by its members and affiliates during the riot. *Id.* at 1469. No disciplinary action was taken against the Union's members who were ultimately convicted of criminal conduct. 311 NLRB at 743.

2. The Decision of the Administrative Law Judge

The Administrative Law Judge (ALJ) dismissed the Complaint. While acknowledging concern over the evidence of LaVallee's involvement, the ALJ found that the evidence of the Union's actual involvement in planning and instigating the attack on BE&K settled into a "state of equilibrium." 311 NLRB at 742. The ALJ viewed the Union's post-riot assistance to participants in the riot as a permissible "fraternal phenomenon." *Id.*

at 743. The ALJ further found that the Union should not be expected to discipline its members convicted of criminal acts during the riot because such conduct was "not inimicable [sic] to trade union objectives in the Boise Cascade dispute." *Id.*

3. The Decision of the National Labor Relations Board

The National Labor Relations Board ("Board") affirmed the findings of the ALJ with minor modifications. The Board viewed the post-riot assistance rendered by the Union as mere assistance to its members in the exercise of a "legal and constitutional right." *Id.* at 734. Thus, the Board did not consider these activities as evidence of condonation and ratification of unlawful acts committed by members during the riot.

4. The Decision of the Court of Appeals

The Court of Appeals for the Eighth Circuit reversed. While expressing reservations about the ALJ's failure to find that the Union was actually involved in participating in the bus trip, the court of appeals found it unnecessary to reach this question. 23 F.3d at 1465. Instead, the court of appeals held that the Union's post-riot conduct, together with evidence of its involvement preceding the riot, constituted ratification and condonation of the unlawful acts of its members and affiliates. *Id.* This conduct included the payment by the Union with Union funds of fines for members convicted of criminal activity during the riot. *Id.* at 1469.

SUMMARY ARGUMENT

The decision of the court of appeals is consistent with applicable prior decisions of the Court addressing the liability of labor unions for unfair labor practices committed by its members. The court of appeals' finding that the Union ratified and condoned its members' unlawful conduct by providing extensive post-riot assistance, including the payment of fines for convicted members, is consistent with common law agency principles and federal labor policy.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THE COURT.

The Court has long recognized that union responsibility for the acts of its officers and members is under ordinary agency principles. *United Mine Workers v. Gibbs*, 383 U.S. 715, 737 (1966). In *United Mine Workers v. Gibbs*, the Court recognized that ratification by a union of violence by its members does not occur merely because the union subsequently becomes involved in the dispute by engaging in "normal union functions," such as strike relief. *Id.* at 738. As the court of appeals observed, the rationale for this rule is to encourage unions to exercise a restraining influence and curb the unlawful activity. 23 F.3d at 1466, *citing Gibbs*, 383 U.S. at 739.

In the instant case, the post-riot activities of the Union were far removed from normal union functions and were wholly unrelated to curbing any unlawful activity. These activities by the Union included: expending a week

of the business agent's time, while on the union's payroll and expense account, to arrange bail and legal representation for arrested union members and affiliates; borrowing $30,000 from the Union's bank to pay for bail, legal fees, and fines for arrested members, including those who were convicted; LaVallee traveling over 400 miles to the location of the riot, where the union had no direct business relationship, to render such assistance; orchestrating collection activities among the Union's members to finance its payment of bail, legal fees, and fines; and attempting to conceal its participation and approval of such actions. 23 F.3d at 1469. Thus, the court of appeals' decision that these activities evidenced the Union's ratification and condonation, absent disavowal of its members' misconduct, is not contrary to the Court's decision in *United States v. Gibbs. See also* RESTATEMENT (SECOND) OF AGENCY, §§94, 83 (1958).

The court of appeals' decision is also consistent with the Court's decision in *Carbon Fuel Co. v. United Mine Workers,* 444 U.S. 212 (1979). In that case, the Court held that an international union was not responsible for extensive "wildcat" strikes by local unions because the International had no obligation to use *all* reasonable means to end the strikes. *Id.* at 217. (Emphasis added.) Thus, the Court rejected the employer's claim that the union was responsible because it failed to discipline participants where the international took other preventative measures, such as advising members that they could be disciplined and expressing repeatedly opposition to wildcat strikes.[2] *Id.* at 213 n.1, 218.

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[2]The Court accepted the international's explanation that it took no disciplinary action out of concern that it would aggravate the situation. 444 U.S. at 213 n.1.

In the instant case, neither LaVallee nor the Union ever made any expression of disapproval of the extended violent activity by the Union's members against BE&K. 23 F.3d at 1469. Further, the court of appeals did not base its finding of ratification and condonation on the Union's failure to discipline its members who participated in the riot.

In *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1921), an action under the Sherman Antitrust Act, the Court held that a national union did not ratify the anti-competitive strike conduct by its local unions when its President mentioned the strike in speeches and thanked the President for pardoning a District President convicted of criminal strike misconduct. *Id.* at 394. Contrary to the characterization of the Petitioner herein, the Court did not hold that failure to disavow the misconduct of its members or to take disciplinary action could not constitute evidence of ratification or condonation. Instead, the Court held only that a national union which has not authorized or participated in a local strike has no duty to "superintend it and to intervene" to prevent unlawful conduct. *Id.* at 395. Thus, *Coronado Coal* does not conflict in any way with the decision below in the present case, where the court of appeals found that the Union indeed ratified and condoned the unlawful conduct by its pre- and post-riot acts.

The decision of the court of appeals is also consistent with the decisions of other courts applying the holdings of the Court. *C&K Coal Co. v. United Mineworkers*, 704 F.2d 690, 696 (3d Cir. 1983) (payment of fines, counsel fees, and costs for strikers not "humanitarian" act, but evidence of ratification); *NCR v. NLRB*, 466 F.2d 945, 961 (6th Cir. 1971), *cert. denied*, 410 U.S. 966 (1973) (failure to disavow members' misconduct constituted

ratification); *Airco Spear Carbon-Graphite v. Local 502, Int'l Union of Electrical, Radio & Machine Workers of America,* 494 F. Supp. 872, 877 (W.D. Pa. 1980) (local union president's failure to disavow or censure illegal work stoppage and posting of bail bonds for arrested pickets constituted ratification); *Int'l Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. American Metal Products Co.,* 408 S.W.2d 682, 692 (Tenn. App. 1964) (furnishing bail bonds and attorneys to union members charged with violent conduct evidenced ratification by international union).

The court of appeals correctly rejected the Board's holding that the Union merely assisted members to exercise a legal and constitutional right. 23 F.3d at 1469-70. The Board failed to consider that the Union's assistance included payment of fines for members ultimately convicted of criminal conduct in connection with the riot, a fact conspicuously absent from the Union's petition to this Court. In addition, the court of appeals correctly noted that the Union had no duty to provide such assistance, and its members had no legal right to receive such assistance from the Union. *Id.* Thus, the court of appeals properly found that by providing such assistance to arrested and convicted members, absent disapproval of their unlawful conduct, the Union ratified and condoned their unlawful actions.

II.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH FEDERAL LABOR POLICY AND DISCOURAGES THE USE OF VIOLENCE IN LABOR DISPUTES.

Unlike the Board's decision, the decision of the court of appeals is consistent with a fundamental tenet of the National Labor Relations Act, fostering the peaceful resolution of labor disputes. 29 U.S.C. §151 (1973 & Supp. 1994); *Legislative History of the National Labor Relations Act, 1935,* 2 NLRB at 2300 (1949) (the "first objective of the bill is to promote industrial peace"); *United Mine Workers v. Gibbs,* 383 U.S. at 739. The Board's decision sends an unequivocal message to organized labor that is inimical to the fundamental premises of American labor law: unions can target non-union companies and their employees for attack, urge their members to take action against them, during the course of which members can commit reprehensible acts of violence to intimidate non-union employees and their union will be there to bail them out of jail, provide legal representation and even pay their fines when convicted. Without question, this policy would encourage the use of violence and intimidation as a tactic in labor disputes. The court of appeals, consistent with national labor policy and the rulings of this Court, prevented this by holding that the Union ratified and condoned the unlawful conduct.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

SAN FRANCISCO BRANCH OFFICE

CASE 18-CB-2021

IRON WORKERS LOCAL NO. 783,
INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS, AFL-CIO

and

BE&K CONSTRUCTION COMPANY

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Lowell J. Noteboom, (Leonard, Street & Deinard),
Minneapolis, MN, for Charging Party.

Nino E. Green, (Green, Renner, Weisse, Rettig,
Rademacher & Clark, P.C.),
Escanaba, MI, for Respondent.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard at Minneapolis, Minnesota, over a course of 4 trial days comprising April 16-19, 1991 inclusive. The charge was filed January 29, 1990 by BE&K Construction Company, for brevity called BE&K, and the complaint was issued December 14, 1990. The primary issue is whether Iron Workers Local No. 783, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, called Respondent, restrained and coerced employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act by participating in a riot in violation of Section 8(b)(1)(A) of the Act.

On the entire record, including my observation of the demeanor of witnesses, and after consideration of briefs filed by all parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

BE&K is a Delaware corporation which maintained an office and place of business in International Falls, Minnesota, where at all times material herein it was engaged in construction and installation of industrial facilities, machinery and equipment. During calendar year 1990 BE&K, in the course and conduct of such business operations, purchased and received products, goods and materials at this jobsite valued in excess of $50,000 directly from points outside the State of Minnesota. On these admitted facts I find that BE&K is, and at all times ma-

terial herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that Respondent, as also admitted, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5).

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. OVERVIEW

On September 9, 1989 a riot happened at the employee housing center for a large construction project in northernmost Minnesota. Extensive background events were plainly associated to this riot, which took many forms touching political, business, trade union, and community interests.

The essential context was institutional and ideological friction when a major industrial construction company undertook a locality-sensitive papermill expansion by its habitual approach of operating nonunion. Respondent is here accused of complicity in this labor dispute-based riot, both by intention and by covert action.

B. GEOGRAPHIC AND ORGANIZATIONAL MATRIX

The enormous amount of activity which this case concerns took place along a crescent of the norrthern Great Lakes area. This ran generally from Marquette situated at a central point in Michigan's upper peninsula, westerly through the tip of Wisconsin to round by Duluth, Minnesota at the end of Lake Superior, and turn northerly to International Falls situated at the Canadian border. This total distance is about 400 miles. As a factor in the variout communicating, venturing, and miscellaneous itineraries that occurred, I also identify Iron Mountain, Michigan. This city is akin to being the hub of a small popula-

tion locale almost astride the Michigan-Wisconsin state line about 75 miles southwest of Marquette, and where much of the case focus truly relates.

Respondent, an organization of 315 members, is a local affiliate of the Iron Workers International Union. the offices of which are in Washington, DC. Its designated trade jurisdiction coincides with the area of Michigan's upper peninsula. At the Michigan-Wisconsin state line this adjoins the comparably understood geographic jurisdiction of Iron Workers Local 563 situated in Duluth. Respondent's intermediate union affiliations are principally as constituent of the Iron Workers International Union, or with organizations of the unionized building trades as these comprise and draw from various construction crafts. In this sense Respondent is a part of the Iron Workers North Central States District Council, the Upper Peninsula Building and Construction Trades Council and, to illustrate parallels with Local 563, the Michigan State AFL-CIO and the Michigan State Building and Construction Trades Council (BCTC). John LaVallee has been Respondent's business manager, financial secretary and treasurer since 1973. He operates from an office in Marquette, situated in a building shared with other unions. The only other fulltime paid employee of Respondent is Beatrice Anderson, an office secretary of over 20 years service with the organization. Kenneth (Ken) Perry is Respondent's elected president and the only other person within the organization other than LaVallee who possesses pronounced executive and financial authority. LaVallee holds concurrent office in the North Central States District Council as its recording secretary.

Escanaba, Michigan is a city on the north shore of Lake Michigan about 60 miles south of Marquette.

Quinnesec is a small community in Michigan only several miles from Iron Mountain. During the summer of 1989 Respondent had members employed on major construction jobs at both Escanaba and Quinnesec. The smaller of these at Escanaba was a project for owner Mead Paper Company with Fru-Con of St. Louis, Missouri as the general contractor. Respondent had reached a project agreement with Fru-Con for this job, and over the course of its approximately 2 years duration furnished a fluctuating crew of iron workers ranging from 20 to 50.

The Quinnesec job was a $350,000,000 paper machine installation for Champion International Paper, which also ran about 2 years for completion. Rust Engineering served as a unionized general contractor for this project. The peak employment of iron workers furnished by Respondent for Quinnesec was about 250 during the eventful September-October 1989 timespan.

Besides these two main projects Respondent had about 150 of its members employed with 25 or so other contractors at various locations within its jurisdiction. In keeping with typical craft union practices Respondent also administered a referral program from its Marquette office. Under this "travelers" from other Iron Worker locals, predominantly the adjoining Local 563 and often, too, from North Dakota Local 793, would work at the trade for contractors engaged in Michigan upper peninsula construction jobs.

Local 563 is a member of the Iron Range Building and Construction Trades Council covering northern Minnesota, the same Iron Workers North Central States District Council, the Minnesota State AFL-CIO and the Minnesota State BCTC. The business manager of Local 563 is Fred Salo, an individual who also concurrently holds

office in the Iron Range BCTC. The president of Minnesota State BCTC is William (Bill) Peterson, whose office is in St. Paul.

C. CONDENSED BACKGROUND

1. Preceding the Riot

In 1988 Boise Cascade announced plans for a $500,000,000 plan expansion of its papermill at International Falls. Initially Fru-Con was expected to handle the project and building trades unions, urgently interested in securing a union mode on the imminent construction work, negotiated for several months with Fru-Con. In March 1989 Boise Cascade actually awarded the expansion project to BE&K, after a large demonstration for public support of a union contract manager had been arranged by local unions around International Falls.

Actual work by BE&K began in early July 1989 with over 100 employees of its own, and subcontractor awards to both union and nonunion employers. By mid-July approximately 100 construction workers were also on the site for various union subcontractors. BE&K's own employees, in keeping with its operating style, were nonunion as were persons employed by any nonunion subcontractor which by then had commenced its phase of the project.[1]

On July 18 a walkout by the unionized construction trades personnel occurred, and disruptive picketing activity at the jobsite commenced in protest of BE&K and nonunion subcontractors. Within several days BE&K

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[1] All dates and named months hereafter are in 1989 unless otherwise indicated.

obtained a temporary restraining order which limited picketing activity and restored a measure of control regarding the dispute. BE&K soon replaced the subcontractors whose union workers had walked out with nonunion subcontractors, and the project continued on that adjusted basis as the summer months passed.

On August 28 a major incident occurred at an employment center maintained by BE&K in a post office basement near the jobsite. Early on that Monday morning this employment office, at which several dozen hires were completing paperwork preliminary to their job orientation, was descended upon by protesters. A crowd of about 40 persons began a menacing disturbance around 7:45 a.m. From their congregation on the outdoor sidewalk they burst down the stairwell and into the personnel lobby, yelling obscenities, vandalizing the application process, and generally intimidating persons inside. Both police and the Vance International Security Service used by BE&K were summoned, and the disturbance was quelled in its serious stage. However, many of the perpetrators remained for several hours outside, performing threatening or distructive activity. Members of this crowd were wearing clothing with union insignia from places as far as Michigan, and they keyed much of their demonstration ire to the theme of "rat(s)" as their objective of protest.

By early September a specialty builder hired by BE&K had finished early phases of an employee housing center located about 2 miles from the actual Boise Cascade expansion project. As ultimately intended for occupancy by about 1,000 persons in dormitory style living, it was then in use by over 100 plus several dozen Vance personnel also housed within this fenced "mancamp." Just prior to September 9 rumors circulated

throughout the community that a large disturbance was about to affect the man-camp.

2. The Riot of September 9

Early in the morning of September 9 large groups began assembling near the man-camp, most of them after arriving from outlying or distant points. The situation was under monitoring by law enforcement authorities, as most prominently under the command of International Falls Police Captain Randy Borden. This officer had reacted to the fully circulating rumor by a special dispersal of his own and auxiliary law enforcement personnel to best position themselves for the rumored event. By as early as 6 a.m. on September 9 it was apparent to Borden that trouble was imminent because of roadways being blocked and loud exhortation to at least trespass.

In further reaction to the rumored event BE&K had canceled work at the project for that Saturday, and had evacuated all resident employees of the man-camp the night before. As the early morning hours of September 9 unfolded the gathered crowd of about 150 persons moved purposefully and ominously from their point of congregation in the city to the man-camp location. Borden deployed his 15 available police offices to the scene as size, mood and momentum of the crowd increased. From about 7 a.m. and for nearly the next hours, the crowd now grown to over 200 and eventually to total about 450, rioted during a breaking down of fencing at the man-camp. This was followed by extensive destruction after they had surged inside the facility and caused personal injury to some Vance guards by rock throwing and physical beatings. Vehicles inside the man-camp were damaged and overturned, dormitories and their contents were vandalized, and various buildings

set afire before the rioters withdrew. The monetary total of loss associated to the riot was approximately $2,000,000.

Among persons participating in this riot were those on a chartered bus that had left Iron Mountain, Michigan the night before. This bus departed at about 7 p.m. on Friday, September 8, and arrived in International Falls at about 3 a.m. after the customary 8 hours driving time. Most of the bus passengers were members of Respondent, and as requested the driver let them out at a union hall. The cost of the round trip charter was to be $1,150, and this amount was paid in cash by the unseen act of money being left on the dashboard just before departure. The bus had been scheduled for a midday return trip on September 9, but it was stopped in transit out of International Falls by police. All occupants were formally disembarked as part of investigatory and pre-prosecutive work relative to the riot. It eventuated that 14 persons from the bus were arrested, and from this number Respondent's members William Ahlich, Leslie Bedell and Richard Pascoe, along with former member Daniel (Dan) Miller plus two iron workers then working in travel status out of Respondent's office and three persons in construction trades other than iron worker were convicted after quilty pleas to violating Minnesota law prohibiting riot.

The animosity of unionized building trades to BE&K was fully documented. Presentation was in keeping with common knowledge in labor relations of the institutional view held by AFL-CIO affiliates toward "merit shop"—termed nonunion contractors. Here evidence was presented that as early as March 1988 the United Brotherhood of Carpenters and the United Paperworkers International Union announced their formation of a joint

"Solidarity Committee." A news release described their intention to carry out "programs in the forest products industry" with particular reference to a "BE&K Alert" relative to this company's asserted "policy to undercut union construction standards in papermill construction projects." This one-sheet release was a harbinger of further reams showing the virulent hostility of building trades unions to the growing nonunion phenomenon in construction, and to BE&K in particular. Suffice it that such material showed an extreme depth of concern, national in scope of publicity and with brooding encouragement of the fullest sort of personal, community, and political pressures to counteract this threat against union labor.

As to the specific expansion project at International Falls this objective manifested with involvement by Minnesota's governor in the dispute, and litigation against numerous parties seeking to establish that a unionized basis for the project must exist because of legally enforceable dealings between Boise Cascade, Fru-Con and the AFL-CIO unions of Minnesota. The violent disruption at BE&K's personnel office on August 28 had occurred principally from action by a bus load of unionists arranged for by officers of Pipe Fitters Local 728 located in Iron Mountain. Admittedly, too, the extent and frequency of cross-communication between key union functionaries, Peterson, Salo and LaVallee included, escalated as the seeming crisis of BE&K successfully verging on eventual project completion at the Boise Cascade expansion grew ever more realistic.

D. RESPECTIVE CONTENTIONS

1. As Made at Trial

General Counsel's opening statement succinctly outlined the project's background, and set forth a goal of proof showing how Respondent "arranged transportation for its members and for others" in connection with the riot.

Charging Party's counsel enlarged on case theory by terming the riot both "planned" by Respondent's "covert" undertakings, and so shown by the "circumstantial evidence" to be adduced. In later colloquy Charging Party's counsel stated, "our case is built on the activities and the interrelationship of these various unions . . ." (Tr. 424).

Initital comment by Respondent's counsel referred to the historically important source of employment in Michigan's upper peninsula that papermill construction comprised, but from this contrasted his client's total lack of any relationship with either Boise Cascade or BE&K in arguing that any "spontaneous" nature of the occurrence on September 9 "was in no way advocated, supported, urged or financed by the Respondent."

2. As Made in Briefs

In his brief Counsel for the General Counsel contends how several components of circumstantial evidence in the case show that the bus load of members traveling from International Falls for arrival early on September 9 was an "official function" of Respondent. Chief among these components was an overwrought fear of successful nonunion contracting, coupled with a configuration of telephoning that would "strongly suggest" the claimed bus arrangements were in fact made by Respondent.

In its brief BE&K advances three theories of violation from the solely circumstantial evidence in the case. It first contends that Respondent "instigated, planned and participated" in the riot, secondly that even if not so doing it subsequently ratified the riotous conduct, and that, thirdly, its members' "mass action" made Respondent liable for the consequences.

Respondent's post hearing brief disputes that circumstantial evidence, particularly the frequency of telephone calls among interested union functionaries, affords a "proper basis" for an inference that they were planning a riot. The brief further contends that the "vast quantity" of data totally fails to establish the claimed planning of, or participation in, what eventuated as the man-camp riot. Generally Respondent's brief is in harmony with its often-repeated statement during trial that documentary evidence, including telephone records, are without "relevance, materiality or other circumstances affecting the probative value" of such items as were admitted.

E. FACTUAL HIGHLIGHTS OF THE CASE

On July 24 LaVallee composed a letter on Respondent's stationery which secretary Anderson typed. The letter was addressed to members and signed by LaVallee. It stated:

> The Boise Cascade Paper Company of International Falls, Minnesota, has selected BE&K as its Construction Manager and General Contractor to build a 535 million dollar paper facility on a Merit Shop Basis. BE&K advised the Iron Range Building Trades Council that no more than 50% of the job would be subcontracted Union and in fact is performing Iron Work and other Trades work on the project on a nonunion basis.

Based on these circumstances and the fact that BE&K is importing non-union workers from the South, the Union Tradesman on the project have chosen not to work side-by-side with these non-union workers and are presently off the project and demonstrating against BE&K and the owner over their choice of importing non-union labor for the project.

Local Union #563, Duluth, Minnesota needs our help, both financially and assisting in demonstrating their right not to work side-by-side with non-union workers.

As Brother Iron Workers, we are asking you for a $10.00 per week voluntary contribution to assist their efforts.

Please donate this contribution to your foreman on a weekly basis until notified otherwise.

Thank you for your support.

Before issuing this letter as an item of regular union mail LaVallee first obtained legal advice. When it developed that the July 18 walkout at International Falls had not been officially sanctioned, LaVallee did not send the letter out as planned. However it soon became known that a copy was circulating among iron workers at the Quinnesec job, and learned even later that the contants had been printed in a Minnesota newspaper. I do not determine from any known facts whether contributions passed through Respondent's office as a result of this letter being leaked; rather the entire murky matter of banded cash amounts that *may or may not* have been responsive is used as a factor in credibility evaluations to be made below.

Donald Dabb individually owns and operates a charter bus service from his home in Aurora, Wisconsin using the

business name Northland Coaches. He is assisted by his wife and son, who particularly cover the telephone when Dabb himself is away as the principal driver for his business. Aurora is only a few miles from Iron Mountain across the state line, and Dabb was the provider of round trip transportation for the charter arranged by Pipe Fitters Local 728 when its members traveled to International Falls and engaged in the personnel office disturbance of August 28.

Dabb testifed that he had never dealt with a person named LaVallee until last summer 1989, when a caller giving that name telephoned to make preliminary inquiry about the chartering of a bus for travel to Minnesota. According to Dabb he estimated the cost of such a trip, but the LaVallee person simply never called back and he assumed such plans were canceled.

However Dabb did schedule and fulfill the chartered trip of September 8-9. He recalled this commitment originating by telephone from a male-voiced caller who identified himself as "concerned persons" interested in an Iron Mountain-International Falls round trip. Dabb gave this price, advised that advance payment would be necessary, and agreed to start the trip at a bar in Iron Mountain named Dad's Place. This establishment was, or had been, owned by the same Dan Miller later to be convicted of riot at International Falls. Dabb commenced the trip on schedule with 36 passengers after finding cash payment in the bus. One of the travelers said only that it had been left by "Dean." The 7 p.m. departure on September 8, was made and Dabb proceeded uneventfully through the night to International Falls after one stop for a single passenger pickup at Iron River, Michigan. He did have very brief, and from his standpoint reluctant, conversation with Miller during the drive.

After his bus emptied in International Falls at approximately 3 a.m., Dabb told the travelers he would look for a local motel to sleep and that they should call him when the return travel was ready to be started.

He was called in late morning by a person saying the group was ready to leave, and "wanted to get out of town." Before leaving his motel Dabb had a brief discussion with a sheriff's officer, the conversation amounting to the officer learning that Dabb was about to drive back and Dabb learning that there had been "some problems" at the locality. He made the intended return pickup of passengers at the Viking Bar, and commenced the intended return just before noon after loading of passengers proceeded promptly. Before clearing International Falls, however, Dabb was stopped by police and his bus escorted to the city's Law Enforcement Center for the disembarking consequences described above.

Immediately after Dabb's return to his home in Aurora another charter trip manifested for him to again travel to International Falls. Dabb testified that this arose by telephone contact from the "concerned persons" caller, and in consequence he left at 3 a.m. on Monday, September 11, to pick up the individuals that had been jailed following their arrests at the bus. When Dabb arrived at the International Falls Law Enforcement Center later that morning he learned that in fact no one was yet released for transport back to Michigan. He waited there for several hours until finally told by the local prosecuting attorney that no releases were imminent. At this point Dabb, and the accompanying friend who helped him drive on long distance turnaround trips, went to Virginia, Minnesota south of International Falls. They remained there at a Holiday Inn while waiting for more instructions, after notifying the Dabb home/office of

their whereabouts. They actually stayed at this Holiday Inn for the nights of both September 11 and 12, and then returned when the entire commissioned charter proved futile. This result seemed plain after Dabb's wife called him to say that "concerned persons" had telephoned her saying there should be no further waiting for the people in jail. Dabb testified that his overall charge would have been $1,350, and none of this amount was ever paid.

According to both Perry and LaVallee they began receiving frequent inquiries from worried friends and family about the union members being held in Minnesota following the riot. Perry's reaction to all this was relatively limited, however LaVallee undertook major relief efforts. His immediate action was to travel to Duluth, and with that as a base of operations undertake legal and financial steps to aid his arrested union members. He spent almost a week in Minnesota, during which time he arranged through his Marquette bank for a $30,000 loan with a wire transfer of the funds to Minnesota. This loan was nominally made on LaValle's personal credit, and approval was based on his telephone request by bank functionaries long familiar with LaVallee as the business holder of his union's several accounts. From his hotel base in Duluth, he made one or more trips up to International Falls, where he engaged attorney Steve Nelson to provide legal representation for numerous arrested persons plus paying out $16,000 in bail amounts from the wired loan proceeds and a lesser amount in fines. LaVallee did not return from Duluth until September 15, at which point the riot consequences were settling out in terms of the various persons who were to await fulfillment of criminal proceedings stemming from offenses that were committed. Bank records establish

that the loan, accounting also for interest and fees, was repaid in three installments. The first repayment was a $12,000 amount toward principal on October 2, and about a month later two further payments liquidated all that had been borrowed. LaVallee testified that money contributions began arriving in late September into early October from the Quinnesec job, terming his assumption of this happening as being that "people were aware of the obligation that I had undertaken to post bail. . . ."

In specific regard to telephone records that might implicate Respondent in at least the chartering of Northland Coaches for the September 9 trip, there are twelve such calls that bear close attention. Using as reference points the telephone numbers: (906) 228-6450(51), (906) 343-6650 and (715) 589-4145 for Respondent's Marquette office, LaVallee's residence in nearby Sand River, Michigan and Northland Coaches at Aurora, Wisconsin, respectively, the following telephoning is shown:[2]

Date	*Time*	*Duration (Minutes)*	*From*	*To*
Sept. 1	9:36 a.m.	2	(906) 228-6450	(715) 589-4145
"	9:42 a.m.	1	"	"
"	6:04 p.m.	1	(715) 589-4145	(906) 343-6550
"	7:15 p.m.	7	(906) 343-6550	(715) 589-4145
Sept. 2	11:00 a.m.	1	(906) 228-6450	"
Sept. 6	1:10 p.m.	1	"	"
"	6:32 p.m.	1	(715) 589-4145	(906) 343-6550
Sept. 7	8:34 a.m.	1	"	(906) 228-6450
"	6:46 p.m.	2	(906) 228-6450	(715) 589-4145
Sept. 8	8:03 a.m.	3	(715) 589-4145	(906) 228-6450
"	9:33 a.m.	1	"	"
"	10:43 a.m.	4	(906) 228-6450	(715) 589-4145

[2] A time zone change separates the Marquette vicinity (Eastern) from points in Minnesota or Wisconsin (Central). Times shown

[footnote continued]

After occurrence of the riot there was apparent telephone communications between Respondent and Dabb at 1:10 p.m. on September 11. Respondent's office received a call from International Falls then, being at about the time Dabb despaired of making the jail pickup as expected. Later at 3:30 p.m. on September 11 another call was made to Respondent's office from the Holiday Inn at Virginia, Minnesota where Dabb had commenced his waiting. A call on September 12 from Duluth to the Holiday Inn at 8:01 a.m., followed a call to LaVallee at Duluth at 7:25 a.m. from his Marquette office. The next day at 9:45 a.m. another call from Duluth to the Holiday Inn at Virginia was made, this being just before Dabb left the area. LaVallee could not recall making either of the two Duluth-originating calls over this September 12-13 period.

F. CREDIBILITY

1. Introduction

As a case uniquely based on circumstantial evidence the ordinary conflicts of testimony are not present. Furthermore the question regarding witnesses of Respondent, or those in likely sympathy with its position, is one of whether the descriptive, connective and episodal self-servingness of what is testified to seems genuine as opposed to contrived.

With that opening comment I first deal with two witness groups, one being those for whom no reason exists to doubt their renditions, and the second being those brief witnesses whose calling was tactical (or tech-

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from the telephone record excerpts are in terms of the time zone at the originating point of the call.

nical) by the party exercising subpoena powers. I thus fully credit the testimony of Robert Anderson, Boise Cascade's public affairs manager, Police Captain Randy Borden, Gary Martin, BE&K's resident project manager at International Falls, John McGriff, BE&K's personnel manager, and Eric Dufford, Vance International's former tactical security cameraman at the man-camp. I exclude as an unnecessary exercise any credibility evaluation of Kevin Nylund, Keith Halverson and Ralph Guentzel, who each essentially denied the possession of subpoenaed documents,[3] of Michael Edens, whose brief testimony was inconsequential, and of Donald Doolittle who, with active representation by private counsel, maintained a Fifth Amendment privilege not to testify.

2. Donald Dabb

This witness was vague, halting and repeatedly voiced lack of knowledge as to matters questioned about, a presentation that left few subjects of evidentiary weight. There are two additional twists to consider; first that Dabb would reasonably have, and faintly gave just such a hint of, the inclination to protect interests of organized labor in his vicinity, and secondly that he repeatedly alluded to a hearing impairment which affected both conversation and his ability to comprehend tonal qualities between voices. Furthermore, as a mixed matter of credibility and case analysis, his family-style bus charter business was subject to various forms of communications

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[3]Halverson was one of the 21 named defendants in Charging Party's civil action filed with Koochiching County (Minnesota) District Court as Case No. 36-C-89-201. Guentzel, a member of Respondent, was one of the 59 persons convicted of riot in the criminal courts of that county, although he was not on Dabb's bus at the attempted start of a return trip on September 9.

success by those placing telephone calls to it. A telephone answering machine was in use, and Dabb at one point referred to more than one son that a caller "could have reached" (Tr. 213). The single phone number at the home for personal and business purposes combined leaves concern for just how accurately Dabb could reconstruct past happenings even if highly sincere by capacity and intent. I leave his peculiar situation as a credibility assessment that by demeanor and probability his testimony is of little value. While not doubting its general correctness as to tangible matters of place, time and distance, I subordinate Dabb's recollection to that of LaVallee where they are in disharmony. Charging Party's particular point about Dabb's possible financial interest in the case outcome has been considered in making this evaluation.

3. Beatrice Anderson

This witness presented with an impressively honest-seeming demeanor and after taking into account her obvious self-interest as a longtime office employee of Respondent I credit her in full. The effect of this assessment is, somewhat as the case with Dabb, to subordinate her less vivid recollection of internal office matters and financial details to that of LaVallee.

I do also note that Charging Party overreaches in its brief with footnote 24, page 12, in writing that Beatrice Anderson testified in her deposition of February 21, 1990 that cash collections were received at Respondent's office "*as a result*" of LaVallee's July 24 letter (emphasis supplied). Beatrice Anderson's deposition falls far short of supporting this phrasing. She was first asked about whether money came in to Local 783 "as a result of this letter?" at deposition page 66, to which she answered "Well, we did get some." In an immediate followup

question she vacillated with "Yes, we did, but I can't–I don't know." In subsequent deposition questioning about whether cash contributions followed from LaVallee's letter her answers included "I–yeh, I can't–I don't know. I don't know that, about time, I–I couldn't answer that (page 68, 11. 6-7), "I–I don't know that" (page 71, 1. 13), "I don't know" (page 73, 1. 25), and "No, I can't–I can't say that, because I don't know what–at what times or specific dates that any collections came to the office" (page 74, 11. 5-7).[4] The upshot of this overreaching in making Charging Party's argument is to further buttress a belief in the underlying, simple sincerity of persons associated with Respondent, as they were taken through a sweeping attempt at reconstruction of myriad events from the past.

4. John LaVallee

a. Summary Belief

In the face of a painstakingly-mounted collection of circumstantial evidence, the general and specific veracity of this key individual is largely controlling of the decision. After full reflection on all factors seeming, or claimed, to touch on a credibility evaluation, I accord near-total acceptance of LaVallee's testimony.

b. Demeanor

LaVallee was most importantly seen in his testifying role on the final day of trial. Although earlier and adversely called by Charging Party, and present during the

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[4]During this line of questioning participating Attorney Green, echoing Attorney Casselman, interposed a tacit objection that the witness was being repeatedly subjected to improper leading questions.

entire hearing, LaVallee's most important offerings came when called as Respondent's chief defense witness. In the course of such modestly extensive examination I was impressed with a consistent and valid-seeming candor in practically all that he had to relate. In the realm of purely subjective reaction to the demeanor of another, I reach the fully positive conviction that his distinctions of fact and perception presented a comfortable assurance of truth-telling. Given the complexities of subject matter about which questioned, he displayed a remarkedly high degree of consistency in his many instances of several times answering.

c. Testing Instances

Aside from the pure demeanor of LaVallee's testimonial appearance, there were several areas in which the veracity of what he recalled was lifted to even higher prominence because of surrounding circumstances. These are largely drawn from a comparison between his testimony at trial and the two-part deposition given by LaVallee in December following the events, particularly Volume II thereof. As to Volume II the passage at pages 98-107 does much to cause disbelief that LaVallee has created only an "alibi"[5] to avoid enmeshing his organization in liability for the riot. This passage shows quite vividly the scope and subject matter of LaVallee's numerous occupational activities, and more importantly the diversity of his contacts. I consider well the internal (and fraternal) union, collective bargaining, community, public relations/publicity, institutional and technical sweep of his working hours, and from that whether it should be reasoned that because of several telephone

[5] A term attributed to General Counsel, as used in his brief at pages 14 and 15.

calls that Dabb's Northland Coaches enterprise in homey Aurora, Wisconsin received it must have been part of a clandestine bus-renting scheme. Upon so considering this point, I believe the requested inference is not an appealing one to make.

In Volume II of the deposition at pages 57-67 LaVallee was questioned exhaustively about a certain check No. 13301 drawn on Respondent's account for $1,250, and taken as cash with a bookkeeping notation of only "LU." His explanation stated that his money was simply turned over to a small contractor of the vicinity, who had been squeezed off a job by the dynamics of other interests jockeying for favored position. However unsavory this might seem in the abstract the point is that LaVallee candidly described the reasons, named all persons and organizations with any knowledge of such dealings, convincingly explained how this odd transaction fit in with construction industry unioneering and generally revealed "chapter and verse" about the entire matter. This was coupled with a prompt and predictable denial to Attorney Noteboom's question whether "any part" of this loosely handled $1,250 cash boodle had been used to pay the Northland Coaches charge to International Falls.

Another sequence of incessant and detailed questioning concerned the earlier cash-oriented transaction, when check No. 13188 for $2,500 was held for 5 weeks as office cash until redeposit on August 29. In this instance the passage covering deposition Volume II pages 15-24 reflected more fully the vagaries of how this small local union of Michigan's sparsely populated upper peninsula operated. The Charging Party's intimations and expectations did not materialize; essentially showing the poverty of its theory that so much of LaVallee's manner of operating was artificial.

In general as to financial affairs LaVallee explained repeatedly that union trustees regularly approved his monthly financial reports, and this explanation was not assailed in any known manner by the deposing party in interest. Perhaps the best instance of these validating examples concerning the solid-seeming veracity of LaVallee's responsiveness was seen in his winsome concession made at deposition Volume II page 50 that "The system we used might be kind of crude, but we got a cash box down there, and that's accounted for." Finally, in an engaging turnaround LaVallee piqued his questioner as to an actual instance of faulted itinerary plans and the capricious vagaries that attend on persons in busy careers of either labor officials *or* law practitioners (deposition Volume II, page 30, 11. 3-4).

d. Privilege Taking

The Charging Party's brief at continued footnote 24, page 13, faults LaVallee for refusing to answer certain questions regarding post-riot fund collections and disbursements on Fifth Amendment grounds. I duck any attempt at an academic exposition of whether such fundamental privilege taking may support an inference adverse to the party exercising this constitutional right. Suffice it instead that in the context and time frame here such privilege taking done during both December depositions occurred after cautious and well-articulated reasons for doing so, first by attorney Green and later by attorney Casselman. Considering the magnitude of the riot episode, the various criminal charges arising therefrom, the widely-dispersed geographic origin of participants, and the non-unraveled manner of financing the large assemblage of early hours on September 9, the caution displayed by LaVallee's counsel (attorney Green dis-

tinguishing his role specially as between private counsel and union counsel) was not untoward. On this basis I reject any slant or intimation that is being suggested for a lessening of LaVallee's credibility standing because he took the Fifth.

e. Consequences of this Assessment

The conglomerate effect of this credibility evaluation is both that I accept LaVallee's basic denial that (1) he had any active role in chartering Dabb's bus for September 9, (2) that he at any time used the pseudonym "concerned persons," and (3) that he funnelled any cash amounts used to defray or bear the cost of Northland Coaches' intended round trip bus transporation for 36 passengers drawn primary from Respondent's craft membership. There remains however the independent and important issue of whether total circumstantial evidence supports what is alleged in General Counsel's complaint, and that topic is treated next.

G. Discussion

Aside from it being a matter of public notoriety the Board is specifically experienced in labor-management strategies based on the growth of open shop construction industry contractors. In *J. E. Merit Constructors, Inc.*, 302 NLRB No. 42 (March 29, 1991) the Board adopted description of a construction contractor which had "historically operated on a nonunion basis," this being background to a major AFL-CIO building trades local union undertaking a planned "step in its 'Fight Back Program' against several nonunion maintenance contractors operating within its territorial jurisdiction." The parallels of this phrasing to background here is a plain instance of the pervasive tension that spreads across this

area of labor management relations, and the depth of feelings that can be engendered. The subject is a long-festering one. In the mid-80's AFL-CIO President Lane Kirkland criticized then-Secretary of Labor Donovan for meeting with officials of the Associated Builders and Contractors, "an organization of predominantly non-union construction firms," with rhetoric that reached a quoted crescesdo of "otherwise pander[ing] to that lousy organization of scab-herders." *Labor Relations Yearbook 1984*, Bureau of National Affairs, p. 257.

As among voluminous contextual evidence here, a relevant item in substance and timeliness to the issue is the collegially-addressed attachment to Bill Peterson's memorandum dated August 24 to "All Building Trades Councils" of Minnesota, urging a large rally turnout at the State Capitol on September 16. The two-page attachment was a partisan condensation of background to the frustrating International Falls developments, and the gave reasons that a practically treacherous combination of political and business forces was threatening the "prevailing wage" justifiably deserved by "our skilled brothers and sisters" which warranted a concerted rendering of "labor's voice . . . about the Boise Cascade situation...

I use this item of documentary evidence as a point of departure for discussion, because LaVallee's version of his late summer activities keys strongly to the message. It was this very rally at St. Paul, Minnesota on September 16 that he testified was the topic of a remembered six or so telephone calls to Northland Coaches in preliminary exploration of whether and by what details a bus charter for his members to St. Paul might be arranged.

In essential rejection of the contentions by General Counsel and Charging Party, I hold that from all material circumstantial evidence LaVallee had in truth

explored this project. The trail of telephone records is as supportable of that proposition as that he was really covertly engaged in plans to participate with other components of upper Great Lakes organized labor in destructive rioting activity at the man-camp, using such of his willing members as would voluntarily engage in this violent activity.

I have found that Dabb's testimony is without value as to analyzing this issue, for I specifically discredit his failure to recall more than one contact or attempted contact running either to or from him as regards Respondent's office on the rally chartering prospects for September 16. Both ends of such contact have a built-in vagueness to them; on LaVallee's part because of his great amount and diversity of business telephoning and on Dabb's part because his family-assisted, residence-based business leaves simply too much random uncertainty about telephone contacts made to it or attemptedly so. Thus I characterize the twelve recorded telephone contacts made or attempted between Dabb's location and LaVallee, either at his home or office, as insufficient to contribute that much of a showing toward an agent of Respondent being the secretive "concerned persons."

A close examination of the specific days, the several times of day, and the recorded duration of calls, suggests quite strongly that no more than six *effective* calls were made as LaVallee had credibly testified. I discount the seven 1-minute calls of September 1 (2), September 2, September 6 (2), September 7, and September 8 as inconclusive telephoning attempts that did not reach the intended callee, or that were absorbed into a message answering machine. I do so both because of the inherent unlikelihood that discussion of the type intimated would

have taken place in the short 1-minute span, and more persuasively that in *each case but one* of a 1-minute call (or set of 1-minute calls) a more substantial telephone contact shows from the records later that same day or early the following morning. The exception applies to the call of September 2 at 11 a.m., one which was not repeated until September 6 at 1:10 p.m. However I note that these were both calls *from* the structured office setting of Respondent at Marquette, and to the less structured Northland Coaches enterprise at a family domicile in small town Wisconsin. Further it is seen that these calls were made on a Saturday and a Wednesday, respectively, leaving not unimaginable that LaVallee carried an intention to inquire of Northland Coaches as more time for response from his members could materialize.[6]

Notably there is another variable in the picture; that of whether some person familiar with Respondent's office, and to its functionaries, surreptitiously used the outgoing office number 228-6450 at some point before the bus trip. Respondent's telephone was not a fully secure instrument, as seen from the aggregate of physical description made in Beatrice Anderson's deposition, and the passage in LaVallee's deposition Volume II, page 89 where he stated how even an "apprentice instructor" might have access.

I do express a troubled outlook as to the twelfth and final call from Respondent's office, and presumably from LaVallee himself by his own version of what was then

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[6]My crediting of LaVallee includes the point that he advised members at their general meeting of the coming September 16 labor rally in Minnesota and asked for a show of interest. The fact that meeting minutes do not cover this subject is noted, but I find this insufficient to counteract the greater likelihood.

afoot, to the Northland Coaches' number. This contact, one of at least 4 minutes duration, was made a scant 8 hours before Dabb was to depart from nearby (to him) Dad's Bar, and there is a natural temptation to believe the timing is so suspect as to tumble down LaVallee's "alibi." I cannot however close the circle on such an inference because of all other factors written about above. What I see here instead is a roughly outlined scenario which is fully as likely as the one on which allegations of the complaint are premised. The drum-beating against BE&K had been loud and long over the many months of 1989. The Quinnesec project was populated with well paid, fully to be employed until December iron workers, many of whom were working out of home Local 563 and more concernedly associated to the International Falls problem. The recent bus trip sponsored only 10 days earlier by locality pipe fitters Local 728 could not have gone without extensive knowledge throughout the Iron Mountain community including the Quinnesec jobsite. These factors were all sufficient in the aggregate to cause any manner and combination of persons to independently plan a counterpart trip, particularly where the situation at International Falls itself was experiencing the dim but growing rumor there that some watershed event would take place at BE&K's man-camp on September 9.

The evidence settles into a mere state of equilibrium. It would require pure conjecture to tip the scale, primary by *assuming* what the content of numerous telephone calls, ostensibly between an agent of Respondent and Northland Coaches, had been. There are various possibilities, if not probabilities, as to such content. Thus, any conjecturing has no solid basis in evidence to choose one likelihood over another. It is a matter of whether to say what "could have been" rather that what "must have

been." I have insufficient basis to say that applicable content *must have* covered impermissible subjects, rather than that it only *could have* so consisted.

I have also considered the upsurge in cross-telephoning between LaVallee and counterpart or interested union functionaries after both the July walkout and the August 28 personnel office disturbance. While of legitimate note I do not attach enough significance to any of this type activity as would vary my fundamental holding. This view also includes an appraisal of LaVallee's July 24 letter as merely his ideated response in support of the tactically-doomed walkout of union members at the International Falls project. The fact that this letter received dissemination after being officially squelched is not a matter of seeming significance to the issue, and I generally view this facet of the evidence as revealing more of background sentiments than of materiality to the crucial issue of agency.

It would be naive to flatly assert that all is known about the eventful summer of 1989. This is particularly true notwithstanding what else I have said about LaVallee's veracity, concerning whether or not he had some foreknowledge that Local 783 members were about to board a bus for some demonstration of union solidarity at International Falls based on their collective planning. As generally commented about before, the intimated interplay of telephone calls and LaVallee's interdicted letter of July 24 exemplify how suspicion might at least be harbored. A comparable reaction is felt for example as to the uncommonly busy telephoning among what Charging Party terms "key players," that is the principal union activists in Minnesota, International Falls on July 26 and 27, but how can these loose ends tie up into some coherent and compelling conclusion binding Re-

spondent? I do not believe they do, nor as applicable to LaVallee's telephoning the International Union on August 29 and twice on September 8, after so few instances of this in immediately preceding periods.

It is in the nature of things that any focus of attention can fluctuate depending on how the world turns. If Respondent's focus in early summer 1989 disclosed numerous telephone calls to Tipp City, Ohio and Eagle River, Wisconsin (Exhibit JX-14), why is it so intriguingly significant that later this sort of focus swung to International Falls, Minnesota and Aurora, Wisconsin? I believe it is understandable to have such shifting attentions, and while I have earnestly reflected on the circumstantial bases of all the evidence that has been marshalled against Respondent I do not believe that it legitimately requires or permits the requested inferences. The issue of this case lent itself from the beginning to a direct opinion as to the cumulative and potentially interconnected significance of all circumstances arising out of the waking hours of many people. In sum I conclude that the evidence as a whole does not support the fundamental allegation of the complaint.

After committing to this overall view of the pre-riot evidence I turn to what both General Counsel and Charging Party contend respecting post-riot happenings. Here I believe these contentions are simply unavailing, for LaVallee's quick and extensive action of that following week seems keyed only to "damage control" regarding the jam in which his members found themselves. While also troubled by a chink in LaVallee's seemingly high veracity by failure to recollect telephoning to Northland Coaches from his Duluth base early in the week following the riot, I do not believe the irregularity suffices to support a claimed unfair labor practice. The activity

was over at this point in time and a bus chartering was simply related to how a detained group of persons might be transported back to their Michigan locations some 400 miles distant. Furthermore Respondent has made no secret of an early contact to Northland Coaches, for Perry described this happening as early as the evening of September 10. The details of this contact and its reasons as perceived by Perry are set forth at his deposition pages 71-74 (Exhibit JX-40). Considering that Perry and LaVallee was apprised of this potential for transportation and among other things picked up on the prospect although not now recalling having done so.

LaVallee was also urgently involved early that post-riot week with the funding of bail and legal expense money for those he wished to assist. Here the focus of the case has been on his motivation in obtaining the $30,000 loan; my view is to propose that the banking practices too should be looked at. LaVallee's motivation was merely a part of his post-riot undertakings, an activity I will write about below in terms of the "condonation" theory faced by Respondent. However the banking decisions also reflect somewhat on the circumstantial import of this case, for if the bank could trust LaVallee on the most informal of loan applications then I see no reason why his confidence in voluntary contributions from union members should not also eventuate. When deposed by BE&K on January 4, 1990 in its civil lawsuit, senior bank vice president Michael Dunn stated that he approved the $30,000 loan on a short-term basis but *informally* because of "time constraints," after taking into account LaVallee's *verbal* assurance that he would pledge his residence in collateral should a longer term be needed before repayment. This largess must have been welcome, but is more a reflection of the business influ-

ence wielded by LaVallee in his home Marquette area than of sound banking practices. Essentially $30,000 was wired off from Michigan based on a telephone call from LaVallee in Minnesota that he needed such an amount as a *personal loan* not to be accountable for by his organization in its formal sense. The ready accommodating of LaVallee was, of course, expectably justified, when only several weeks later he made cash payment of over one-third the total amount to bank operations manager Sue Johnson (deposed simultaneously with Dunn and others) while making the intimation that such proceeds occurred because "they passed the hat." The significance of all this to the case is that post-riot funding was first, last and foremost a fraternal phenomenon among all involved in fulfillment of tacit expectations based on shared union percepts.

Having not seen from the overall evidence the establishment of an agency connection to Respondent respecting the riot, I do not reach General Councsel's and Charging Party's contentions respecting Respondent's claimed instigation, planning and participation in the riot. For this reason I do not treat the main doctrine of agency, and also do not reach for discussion cases such as *Int'l. Longshoremens and Warehousemen's Union, Local 6 (Sunset Line and Twine Co)*, 79 NLRB 1487 (1948), *Plumbers, Local Union No. 195*, 233 NLRB 1087 (1977), *Avis-Rent-A-Car System*, 280 NLRB 580 (1986) and *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988) on which the doctrine is based. General Counsel and Charging Party however advance two further theories in support of the complaint, one of condonation and one of "mass action" by union members.

Respondent faces a specific contention that it condoned the riotous conduct, by not disciplining its involved members as empowered to do. It is not realistic to expect that Respondent would impose discipline within the meaning of its organizational authority. While not openly praising the rioters' conduct, the activity was not inimicable to trade union objectives in the Boise Cascade dispute. In terms of the International Union's constitution, 10 of the 11 enumerated grounds for "charges" against a union member are not remotely relevant. Number 10 considers an offense to be any act "likely . . . to bring discredit" on the union, or to produce any "derogatory" result. In a realistic sense this item is a dead letter insofar as any Local 783 member perhaps being charged. Regardless of verbiage it would certainly be against the spirit of the union's constitution and its objectives. Furthermore, the errant members were in the clutches of the criminal justice system, and Respondent's essential role after September 9 was to deal with them as needful strandees. I reject the condonation theory on the basis that it does not square with typical reasons for intra-union member discipline, and does not have a context close to the Respondent's field of geographic influence as typically so in condonation cases. Because I do not consider Respondent's post-riot acts of assistance as condonation, nor do I believe it had standing to effect discipline within the meaning of that concept in labor organization affairs, I also neither treat cases such as *East Texas Motor Freight*, 262 NLRB 868 (1982), *General Teamsters, Local 326 (Eazor Express, Inc.)*, 208 NLRB 666 (1974), *International Brotherhood of Boilermakers, Local 1*, 297 NLRB No. 75 (December 29, 1989), and *Local 248, Meat & Allied Food Workers*, 222 NLRB 1023 (1976). All of these cases involve picketing

activity by the union members involved, a far and distinguishable cry from even not unspontaneous destructive conduct by persons acting 400 miles distant outside the jurisdiction of the labor organization being charged, and subjecting themselves to specific criminal and civil liability in the process.

Finally the "mass action theory of Charging Party is reached, but again this is merged into notions of condonation which I hold inapplicable to the proceeding. Beyond this, and more importantly, I do not believe the "mass action" doctrine is fundamentally applicable to this case by its nature based uniquely on circumstantial evidence.

Food & Commercial Workers Furriers Counsel, 280 NLRB 922 (1986), cited by Charging Party, is simply not in point, while *Tri-State Building Trades Council (Backman Sheet Metal*, 272 NLRB 8 (1984) is a fact-intensive case unsuitable as authority to support the defined "mass actions theory of liability for group action alone. *Burgreen Contracting Co.*, 195 NLRB 1067 (1972) was a case of "mass picketing [around] mine property entrances" with union "responsibility" based largely on (1) presence at, in roles of spokesman, each mine site of presidents of a union affiliate, and (2) substantial evidence that union agents "were intimately involved in the orchestrated arrivals and departures of the pickets at each of the five mine properties . . ." *Sheet Metal Workers, Local 28*, 196 NLRB 1065 (1972) involved union responsibility based on "the inescapable inference" that it "approved and ratified the work stoppages [and] actually participated in them." *Teamsters Local 85 (San Francisco Newspaper Printing Company)* 191 NLRB 107 (1971) fundamentally turned on "signs" evidencing union support for unlawful picketing.

In *Consolidation Coal Co.*, 709 F.2d 882 (4th Cir. 1983) the court traced origin of the "mass action" theory from *Carbon Fuel Company v. UMWA*, 444 U.S. 212 (1979); 500 F.2d 750 (2nd Cir. 1975) and found, in its case, that "mass action" was "establishe[d]" because not only members but "all officers" of a defendant local union "participated in the work stoppage." I find the *Burgreen Sheet Metal Workers, Teamsters Local 85* and *Consolidation Coal Co.* cases above fully distinguishable from this fact situation, and reject their applicability. Even *Eazor*, supra, was a timid presentation of the theory, for the passage of *Eazor* from the Court of Appeals quoted in Charging Party's brief *followed* a reference to the "so-called" mass action theory about which, without holding it as a well-defined doctrine, the court only noted that "many courts" had held unions responsible. See *Eazor v. Teamsters*, 520 F.2d 951, 963 (3rd Cir. 1975). In summary, I reject the mass action theory as having application to this case.

CONCLUSIONS OF LAW

1. BE&K Construction Company is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

2. Iron Workers Local 783, International Assocation of Bridge, Structural and Ornamental Iron Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent labor organization did not engage in unfair labor practices as alleged.

DISPOSITION

On the foregoing findings of fact and conclusions of law and the entire record I make the following recommendation:[7]

ORDER

The complaint is dismissed in its entirety.

Dated: April 29, 1992

/s/ David G. Heilbrun
David G. Heilbrun
Administrative Law Judge

[7] **If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.**